88-860

Supreme Court, U.S.
FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

LUMBEE FARMS COOPERATIVE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

BYNUM M. HUNTER*
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APPENDIX A

No. 87-3636

LUMBEE FARMS COOPERATIVE, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Argued: April 8, 1988
Decided: June 28, 1988

Before WIDENER and SPROUSE, Circuit Judges, and MACKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Allan L. Shackelford (Martin N. Erwin, Michael A. Gilles, SMITH, HELMS, MULLISS & MOORE on brief) for Petitioner.
Laurence S. Zakson (Rosemary M. Collyer, General Counsel; John E. Higgins, Jr., Deputy General Counsel; Robert E. Allen, Associate General Counsel; Aileen A. Armstrong, Deputy Associate General Counsel; Collis Suzanne Stocking, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD on brief) for Respondent.

PER CURIAM:

Lumbee Farms Cooperative, Inc. petitions for review of the order of the National Labor Relations Board finding that Lumbee committed unfair labor practices in violation of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), by discharging four employees because of their involvement in protected activities and by refusing timely to reinstate unfair labor practice strikers upon their unconditional application for reinstatement. The Board has filed a cross application for enforcement of its order.[1]

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[1] The Board's order is reported at 285 N.L.R.B. 51 (1987).

Lumbee operates a poultry processing plant, employing approximately 450 employees. Some of the employees formed an "Employees Concerns Council" (ECC) in 1984 to facilitate communicating their grievances, including their desire for higher wages, to management. In response to ECC's requests, some of the grievances were resolved. As of August 1985, however, the employees had not received a pay increase for three and one-half years, and the plant manager indicated to them that there was little hope for a pay raise in the foreseeable future. The ECC met on August 19, 1985 and again on August 22 and discussed the possibility of a strike to bring about better working conditions and increases in pay. Margaret Johnson, an ECC leader,

suggested that August 27 would be a prime walkout date because Lumbee would be processing a large number of chickens on that day. Before deciding on a strike, however, ECC members decided to solicit support from other plant employees.

On the afternoon of August 26, Isiah Jackson, a company employee, informed management officials that he had learned from coemployees Clark, Smith, Williams, and Townsend that there would be a walkout on the morning of August 27. Jackson related that these employees solicited him to join the strike. He stated that the employees told him the strike was motivated by their desire for higher wages and their concern over Lumbee's hiring of Korean immigrants. The general manager immediately called

the four employees Jackson had named to his office and terminated them for "restriction of output and intimidating others to try to stop output" in violation of a company rule.[2]

After news of the discharges reached other employees, approximately 100 of them walked out of the plant at 8:00 a.m. on August 27. About one-half of the strikers responded to Lumbee's general manager's threat that they must return immediately or be replaced. The others refused to return to work and left the plant. Later that day and continuing on August 28, the employees conducted picketing activities in support of their

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[2] Smith denied speaking with Jackson, and Lumbee later reinstated her with backpay.

unfair labor practices claims and their economic demands.

An organizer for the Industrial Union Department of the AFL-CIO (the IUD) met with the employees on August 28 and, after receiving background information concerning the strike, he advised them to make an unconditional offer to return to work. He told them that although they were engaged in an unfair labor practices strike, they had little chance of success. The organizer again met with the strikers on the morning of August 29. The strikers advised the organizer that they wished him to be their spokesman to communicate an unconditional offer to return to work, and he sent Lumbee a telegram relaying that message. He also advised the strikers to put away

their picket signs and to return to work at the regular time the following morning.

The plant manager replied by telegram that the employees had been permanently replaced and that he would respond in greater detail when he had received the representative's written communication. At the same time, the plant manager instructed Lumbee's chief security officer not to permit the strikers to enter plant property. He directed that if any of the strikers entered the property, they were to be arrested for trespassing. On the morning of August 30, at least forty seven of the strikers attempted to return to work in an "autocaravan," but were turned away with a warning that anyone entering the

property would be arrested. The striking employees honored the security officer's direction.

Lumbee subsequently contacted the former strikers by mail and informed them that, if they responded with an indication of interest, they would be reinstated as jobs became available. Lumbee eventually offered jobs to some of the strikers. Some of the jobs offered were identical to those the employees had held before the strike, but some were different. Vivian Godwin, one of the leaders of the strike, was reinstated to a job different from the one she had held previously, but then was terminated almost immediately. Lumbee asserts her termination was for refusal to perform her job and insubordination. Godwin

contends, however, that she was terminated because of her participation in organizing the strike.

The ALJ found that Lumbee violated section 8(a)(1) by discharging Clark, Townsend, and Williams on August 26, 1985; by failing fully to reinstate the unfair labor practice strikers upon their unconditional offer to return to work on August 30; and by discharging Godwin after she had returned to work because of her previously protected concerted activities. The Board adopted the ALJ's findings and order.

Lumbee contends that Clark, Townsend, and Williams were discharged because their actions were improperly motivated by their objection to the presence of Koreans in their work force

and that their terminations were brought on by their remarks concerning the Koreans. The employees contend that the reference by one or more of the women to the four Koreans in the plant was only a passing remark related to an economic concern and that the women promoted the walkout to improve their economic and working conditions.

Evidence was presented before the ALJ to support each of these opposing positions. Both the ALJ and the Board agreed with the employees, finding that the walkout was motivated by legitimate economic concerns and that the employer's decision to fire the employees was motivated by their participation in

the protected activities.[3] Determination of the parties' motivations is a factual determination. Salem Leasing Corp. v. NLRB, 774 F.2d 85, 89 (4th Cir. 1985). Here, substantial evidence supports the Board's findings, and we find no basis for disturbing its decision. See Universal Camera Corp. v. NLRB. 340 U.S. 474, 487 88 (1951). (Board's findings will be accepted when supported by substantial evidence); accord NLRB v.

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[3] The ALJ credited Jackson's testimony to the extent that he accepted that the employees told Jackson the hiring of Koreans "who would work for anything" was a source of discontent. The ALJ also noted, however, that Jackson's testimony concerning the cause of the strike was ambiguous, that the employees had complained about low pay on numerous prior occasions but that no mention was made of the hiring of Korean workers during the organizational meetings for the strike, and that only six of Lumbee's 450 employees were Korean.

Daniel Construction Co., 731 F.2d 191, 193 (4th Cir. 1984).

Similarly, the parties introduced conflicting evidence concerning the motivation for Godwin's discharge after her return to work at Lumbee. Both the ALJ and the Board concluded that Godwin's firing was in retaliation for her earlier concerted activity. This finding also was supported by substantial evidence and therefore is entitled to acceptance. Universal Camera, 340 U.S. at 487-88; Daniel Construction Co., 731 F.2d at 193.

We find no merit to Lumbee's contention that the IUD representative was not an appropriate agent to relay the employees' unconditional offer to return to work because his union was not their

elected representative. See Marlene Industries Corp. v. NLRB, 712 F.2d 1011, 1018 (6th Cir. 1983); NLRB v. Phaostron Instrument & Electronic Co., 344 F.2d 855, 859 (9th Cir. 1965). We similarly reject Lumbee's contention that the IUD is not a "person" with the capacity to file charges pursuant to 29 U.S.C. § 152(1). See 29 U.S.C. § 152(5).

The petition of Lumbee is, therefore, denied. The order of the NLRB is enforced.

DENIED.

APPENDIX B

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LUMBEE FARMS
COOPERATIVE, INC.

and Cases 11--CA--11773
11--CA--11841

INDUSTRIAL UNION
DEPARTMENT, AFL--CIO

DECISION AND ORDER

On 27 May 1986 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a cross-exception and answering brief. The Respondent also filed a motion for oral argument before the Board to which the Charging Party filed an opposition, and the Respondent filed a motion to strike

evidence from the Charging Party's opposition to the Respondent's motion for oral argument.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2]

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[1] The Respondent's motion for oral argument before the Board is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties. Accordingly we find it unnecessary to pass on the Respondent's motion to strike portions of the Charging Party's opposition to the Respondent's motion for oral argument.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB

(continued...)

and conclusions, to modify the remedy,[3] and to adopt the recommended Order as modified.

We agree with the judge that the Respondent violated Section 8(a)(1) by discharging employees Clark, Townsend, and Williams because of their protected activities. The dissent argues that these employees were lawfully discharged

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[2](...continued)
544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The General Counsel excepts, contending that the name of Maggie Shaw was inadvertently omitted from the list of unfair labor practice strikers. We find merit in this exception and shall amend the Order and notice accordingly.

[3] Interest will be computed in accordance with our decision in New Horizons for the Retarded, 283 NLRB No. 181 (May 28, 1987). Interest on amounts accrued prior to 1 January 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with Florida Steel Corp., 231 NLRB 651 (1977).

for soliciting a strike based on the Respondent's hiring of Koreans and foreigners.

The dissent relies on the suspect testimony of employee Isiah Jackson,[4] whom the judge found to be "in no way a model witness," one whose testimony "was notable for its lack of detail," and who "testified in vague, generalized and conclusionary terms." Jackson allegedly told Processing Manager Frank Watts that the employees were walking out because the Respondent had "kind of slipped too many orientals and Koreans in." This same statement was then repeated to General Manager Walter Geiger, who then

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[4] The dissent also relies on the testimony of employee Maynor. The statement Maynor testified to was uttered in a nonstrike context several weeks before the walkout.

supposedly responded to the effect that "no one was going to tell him he couldn't hire Korean nationals."

Although the judge credited Jackson's testimony to the limited extent that it showed that one or another of the discriminatees alluded to Respondent's hiring of Koreans when they discussed the feasibility of a strike with him, our dissenting colleague's reliance on the particular statements related by Jackson and Geiger[5] is faulty for several reasons. First, we note the inconsistent quality of employee Jackson's overall testimony. For example, as admitted by Jackson on cross-examination, when he testified at an unemployment

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[5] The dissent relates Geiger's testimony though finally conceding that it was discredited.

compensation hearing he only testified that employee Clark asked him whether he was going to walk out with them. Jackson made no reference at the compensation hearing to Koreans being mentioned as a reason for the walkout---a glaring omission in view of our colleague's reliance on the "Korean issue" to justify dismissing the entire complaint. As to Geiger's testimony, the judge found Geiger's statement that "no one was going to tell him he couldn't hire Koreans" "smacked" of afterthought. We agree. Additionally, Geiger's testimony differs from his prehearing statement, in which he asserted Jackson told him the employees were walking out because the Respondent "was hiring too many foreigners and they would work for

anything." This statement, having been recorded closer in time to the event, better reflects what was said to Geiger and very clearly shows what the employees were concerned about---economics.

The employees had indicated to management an ongoing concern with the fact they had not received a wage increase for a number of years and even went so far as to form a committee, the ECC, to deal with the problem. As late as 3 days before Townsend, Clark, and Williams were discharged, ECC spokeswoman Margaret Johnson had spoken with Geiger about the employees' desire for a wage increase. Thus, at the time of the walkout, the wage issue was very much on the minds of the employees. It is undisputed that there were two prewalkout

meetings held 19 and 22 August at which there was no mention of Koreans as a reason for the proposed tentative walkout. After all, practically speaking, there were only 6 Koreans in a work force of 450, hardly a number that would rouse employees to take to the picket line.

There was also no showing that the employees in any way sought to coerce the Respondent not to hire foreigners or to discharge those foreigners already employed. It is clear to us that the employees' concerns were economically, not racially, based and our dissenting colleague's attempt to frame them as racially motivated lacks substantiation. It is also clear that the strikers' goals were compatible with lawful and protected

aims. As noted by the judge, "it is reasonable to conclude that the discharged employees' remarks were reflective of an economic concern rather than one based on race, national origin or other irrelevant considerations."

That the Respondent was concerned with the fact certain employees were soliciting a strike and seized on the "Korean issue" as a rationale to justify its unlawful actions is quite apparent. This is supported by the Respondent's failure to inform the discharged employees that they were fired for mentioning Koreans; its failure to allow the discharged employees any rebuttal of the charges against them; its hasty dismissal of the employees; and the fact the Respondent never showed that the

rule relied on to discharge the employees had any application to their actions. The employees were terminated for "restricting output" and yet there was no showing that they were, in fact, restricting any output.

For all of the above reasons we believe the judge was correct in determining that the discharged employees did not engage in misconduct which deprived them of the protection of the Act and that the Respondent's motivation for its action was not any reference by the discharged employees to Koreans or foreign nationals but rather their efforts in soliciting Jackson to strike. Accordingly we adopt the judge's conclusions that the Respondent violated Section 8(a)(1) by discharging Clark,

Townsend, and Williams for engaging in protected activities, and that their terminations provided the final impetus for the strike, thus making it an unfair labor practice strike.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Lumbee Farms Cooperative, Inc., Lumber Bridge, North Carolina, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Add the name of Maggie Shaw to paragraph 2(a) of the Order.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. 31 August 1987

_____
Wilford W. Johansen, Member

_____
Marshall B. Babson, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN DOTSON, dissenting.

Contrary to the judge and my colleagues, I find that the Respondent did not violate Section 8(a)(1) by discharging employees Patsy Clark, Jeanette Townsend, and Diane Williams on 26 August 1985. Rather, I find that these employees were lawfully discharged for soliciting an employee to strike to protest the Respondent's hiring of Korean employees.

In the fall of 1984 the Respondent's employees, who were not represented by a union, formed the Employees Concerns Council and had a series of meetings with the Respondent in an attempt to resolve employee concerns. Although the Respondent agreed to certain changes

requested by the Council, no agreement was reached concerning a wage raise for employees.

On 19 and 22 August 1985[1] the officers of the Council met with some employees and decided to strike on 27 August if they could persuade enough employees to join them.

Employees Jeanette Townsend, Patsy Clark, Diane Williams, and Brenda Smith met with employee Isiah Jackson and solicited his support for the strike. According to Jackson, whom the judge credited, these employees stated that the purpose of the strike was to protest the Respondent's hiring of Koreans instead of local people. Around 4 p.m., on 26

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[1] All dates are in 1985 unless otherwise noted.

August, Jackson informed Frank Watts, the Respondent's processing manager, that there would be a strike the next morning. When Watts asked the reason for the strike, Jackson replied, "because they [the Respondent] have kind of slipped too many orientals or Koreans in."

Jackson repeated this information to Walter Geiger, the Respondent's general manager, and to Supervisor Pauline Locklear, who also had heard employees talk of a strike set for the next day. Geiger told Watts to fire Townsend, Clark, Williams, and Smith, and

Watts did so.[2] The employees struck as scheduled at 8 a.m., on 27 August.

The judge found that the Respondent's discharge of Clark, Townsend, and Williams violated Section 8(a)(1). He rejected the Respondent's contention that the discharges were motivated by the employees' attempt to have the Respondent discriminate against Koreans, an act which the judge, in agreement with the Respondent, conceded would be unprotected. The judge concluded that the employees' objection to the hiring of foreigners was not premised on the foreigners' nationality

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[2] Smith subsequently informed Geiger that, although she had been present with the other three employees when they talked to Jackson, she had said nothing. When Jackson confirmed Smith's contention, Geiger reinstated Smith with backpay on 28 August.

but rather "their depression of the wage rates," thereby making their remarks to Jackson reflective of an economic concern. The judge concluded alternatively that even if the employees' remarks to Jackson had been unprotected, the discharges were based not on the substance of their remarks to Jackson but simply on the fact that they had solicited Jackson to support a strike.

The judge's analysis is seriously flawed. Most significantly, it does not comport with his credibility resolutions. As noted above, the judge credited Jackson's testimony that he informed Watts and Geiger that the employees were planning to strike in protest of the

Respondent's hiring of Koreans.[3] In fact, the judge noted that employee Yvonne Mayor testified that she had heard Clark, Townsend, and Williams complaining about "Koreans being hired, taking jobs they thought Americans should have."

Given this credibility finding,[4] the judge should have logically dismissed the complaint since the clear import of

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[3] The judge specifically discredited the testimony of Clark, Townsend, and Williams, who denied they solicited Jackson or other employees to strike.

[4] My colleagues attempt to undermine this credibility finding by referring to Jackson's testimony as "suspect" and to the judge's various characterizations of Jackson's testimony. The fact remains that, despite his reservations about Jackson's testimony, the judge credited Jackson. Unless my colleagues wish to reverse the judge's credibility findings, they cannot choose to ignore Jackson's credited testimony simply because it does not fit within their desired view of the case.

Jackson's testimony was that Clark, Townsend, and Williams were seeking by means of a strike to pressure the Respondent to unlawfully discriminate against Koreans. Because such a strike, as the judge concedes, constitutes unprotected activity, the Respondent was privileged to discharge those employees engaging in such unprotected activity. See Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942).

The judge, however, circumvents this credibility finding by ascribing to the employees' anti-Korean remarks an incredible meaning. The judge concludes that the remarks were "reflective of an economic concern rather than one based on race, national origin, or other irrelevant consideration" because the

employees' objection to Koreans "was premised not on their nationality but upon their depression of the wage rates." Not only does this conclusion strain credulity, but it is totally dependent on assumptions which are not supportable by the record testimony. Clark, Townsend, and Williams did not testify that their anti-Korean remarks were economically based. Rather, as noted above, they denied ever making such remarks. Nor did any other employee give any testimony on which the judge could base this conclusion. The judge relied solely on the prehearing affidavit[5] of Geiger in which Geiger stated that Jackson told him that Clark, Townsend, and Williams stated that the strike was called because Geiger

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[5] The affidavit was not offered into evidence.

"was hiring too many foreigners and they would work for anything." The latter part of this statement, which is on its fact ambiguous, is totally insufficient to establish an economic basis for the employees' hostility toward the Korean employees. Nor can it serve to erase the clear and unambiguous testimony of Jackson, Watts, and Geiger, each of whom credibly testified that Jackson reported to Watts and Geiger that the sole purpose of the strike was to protest the Respondent's hiring of Koreans---period.

Under these circumstances, I find that the remarks of Clark, Townsend, and Williams constituted unprotected activity.

The judge's alternative conclusion that the Respondent did not discharge

Clark, Townsend, and Williams for uttering these remarks is similarly disingenuous. According to the judge, the Respondent's discharge of these employees was motivated not by the substance of these remarks but rather by the fact that the employees solicited Jackson to strike. Implicit in this finding of the judge is that the act of soliciting Jackson to strike by Clark, Townsend, and Williams, in and of itself, constituted protected activity. This premise, however, is erroneous.

A solicitation of an employee to another employee to join an unprotected strike itself constitutes unprotected activity. See, e.g., General Electric Co., 155 NLRB 208, 218--220 (1965). Thus, the distinction created by the

judge between the act of Clark, Townsend, and Williams in soliciting Jackson and the substance of their remarks to Jackson is of no legal consequence.

In any event, even if the judge's distinction had a valid basis, the factors relied on by the judge to support his finding that the discharges were motivated by the solicitation of Jackson are equally unsound. The judge relied on the Respondent's failure to investigate whether or not Clark, Townsend, and Williams in fact uttered the remarks attributed to them by Jackson; its haste in effectuating the discharge; its reliance on rule D-16[6] to support the

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[6] While the rule was not placed into evidence, Watts testified that it "prohibited (continued...)

discharge decision; and its failure to inform employees that they were discharged because of their anti-Korean remarks. All of these factors merely serve to establish that the judge, substituting his own business judgment for that of the Respondent, would have acted differently than the Respondent on learning of the impending unprotected strike. They do not establish that the Respondent differentiated in any way between the act of solicitation and the substance of the anti-Korean remarks, nor that its immediate decision to discharge Clark, Townsend, and Williams on learning

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[6](...continued)
restriction of output and intimidating others to try to stop output."

of their remarks to Jackson was based on such a differentiation.[7]

In sum, I find that the Respondent lawfully discharged Clark, Townsend, and Williams for their unprotected remarks to Jackson. Accordingly, I find that the subsequent strike, even if, as found by the judge, it was caused at least in part by the discharge of these three employees, was not an unfair labor practice strike and the employees were

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[7] The judge discredited Geiger's testimony that he told Watts, at the time he instructed him to discharge Clark, Townsend, and Williams, "no one was going to tell me that I could not hire Korean nationals, that it was against the law to discriminate against any former race as long as they were citizens in this country. . . ." Such testimony would, of course, belie the judge's finding that the discharges were violative of Sec. 8(a)(1). While the correctness of this credibility finding is not free from doubt, I have, for purposes of this decision, assumed its validity. There is thus no validity to my colleagues' assertion that I relied on Geiger's discredited testimony as support for my dissent.

not entitled to immediate reinstatement on their unconditional offer to return to work. For these reasons, I would dismiss the complaint in its entirety.

Dated, Washington, D.C. 31 August 1987

Donald L. Dotson, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employers these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for engaging in protected concerted activities under the Act for mutual aid or protection.

WE WILL NOT fail or refuse to reinstate, either in a timely manner or at all, unfair labor practice strikers upon their unconditional application to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce

employees in the exercise of rights guaranteed them by Section 7 of the Act. WE WILL offer Patsy Clark, Jeanette Townsend, and Diane Williams and, to the extent we have not already done so, the unfair labor practice strikers listed below, immediate and full reinstatement to their former positions or, if such positions no longer exist to substantially equivalent positions and make them whole for any earnings they have lost as a result of our discrimination against them, plus interest:

Diane Bell	Dazza McBryde
Leacher Bilbo	Ola McBryde
Sarah Brooks	Gladys McDonald
Barbara Bullard	Barbara McDougald
Rosie L. Campbell	Jonathan McEachin
Vanessa Campbell	Shirley McEachin
Christine Chavis	Johnny McGougan
Vickie Chavis	Judy McNeill
Barbara Collins	Joann Miller

Delphine Edwards
Vivian Godwin
Margaret Johnson
Vernice Johnson
Sandra Judd
Annette Locklear
Geneva Locklear
Gloria A. Locklear
Ruby A. Locklear
Shirley Locklear
Gloria Mainor
Helen McAllister
Johnnie McAllister
Martha McArn
Brenda McBryde
Charles Pearson
Teresa Ray
Eddie Shaw
Maggie Shaw
Mary Shaw
Mildred Shaw
William Shaw
Carrie Simpson
Barbara Smith
TeWanda Spearman
Kunehona Visessing
Eva Watkins
Gloria Williams
Mary Willis

WE WILL notify Patsy Clark, Jeanette Townsend, and Diane Williams that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

LUMBEE FARMS COOPERATIVE, INC.

_____
(Employer)

Dated _____

By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Courthouse, Federal Building, Room 447, 251 North Main Street, Winston-Salem, North Carolina 27101, Telephone 919--761--3212.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

LUMBEE FARMS COOPERATIVE, INC.	CASES 11-CA-11773 11-CA-11841
and	
INDUSTRIAL UNION DEPARTMENT, AFL-CIO	

Ann B. Wall, Esq., for the General Counsel.
Allen L. Shackelford and Michael A. Gilles, Esqs., (Smith, Helms, Mulliss and Moore), Greensboro, NC, for Respondent.
Michael Black, Charlotte, NC, for the Charging Party.

DECISION

Statement of the Case

HUTTON S. BRANDON, Administrative Law Judge. This case was tried at Lumberton, North Carolina on 10-12

February 1986. The charge in Case 11 CA-11773 was filed by Industrial Union Department, AFL-CIO, herein called the IUD, on 4 September 1985,[1] and amended on 11 September and 21 October. The charge in Case 11-CA-11841 was filed by the IUD on 13 November and amended 23 December. The complaint in Case 11-CA-11773 issued on 18 October and an order consolidating cases, complaint and notice of hearing consolidating Case 11-CA-11773 with 11-CA-11841 issued on 30 December. The issues framed by the complaint and the answer filed by Lumbee Farms Cooperative, Inc., herein called Respondent, is (a) whether Respondent violated Section 8(a)(1) of the National

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[1] All dates are in 1985 unless otherwise stated.

Labor Relations Act, as amended, herein called the Act, in discharging three employees on 26 August because of their activities protected under the Act, (b) whether a strike which occurred at Respondent's plant on 27 August was caused or prolonged by the discharge of the three employees on 26 August, (c) whether the strikers made an unconditional offer to return to work on 29 and/or 30 August, (d) whether Respondent unlawfully refused to reinstate the strikers on 30 August, and (e) whether, following their reinstatement Respondent discharged Margaret Johnson and Vivian Godwin on 14 and 16 October, respectively, because of their involvement in activities protected under the Act.

Upon the entire record, and my observation of the demeanor of the witnesses and after giving due consideration of the briefs filed by the General Counsel and Respondent,[2]

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[2] On 14 April 1986, Respondent filed a reply brief to the General Counsel's brief, with attachments, and containing alternative motions to either strike an argument from the General Counsel's brief or to reopen the hearing. On 18 April 1986, the General Counsel filed a motion to strike Respondent's reply brief and an opposition to Respondent's alternative motions. Respondent's alternative motions and the General Counsel's opposition thereto are hereby entered in the record as ALJ Exhs. 1 and 2, respectively. The Board's Rules and Regulations, Series 8, as amended, make no provision for the filing of reply briefs to administrative law judges. No party herein requested, and no provision was made for, the filing of reply briefs prior to the conclusion of the hearing. Respondent made no post hearing request for permission to file a reply brief before filing the instant one. Accordingly, and also because Respondent's reply brief refers to, and attaches, evidence outside the official transcript in this proceeding, General Counsel's motion to strike Respondent's reply brief is granted. Respondent's alternative motions to strike arguments in the General Counsel's brief or to reopen the hearing is based

(continued...)

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[2](...continued)
upon a dispute which arose at the hearing between a General Counsel witness and a prehearing statement submitted by that witness to a Board agent. To resolve the dispute created by the witness' contention the prehearing statement was incorrect, Respondent at hearing proposed to call as a witness the Board agent who took the statement. General Counsel opposed by taking the position essentially that the statement was not inaccurately taken by the Board agent. The Board agent thus did not testify. In her brief, however, the General Counsel argued that variations and omissions from statements of witnesses as compared with their testimony at hearing often reflects "the skills and aims of the investigator and are not necessarily of impeachable character." Philips Medical Systems, Inc., 243 NLRB 944, 956 (1979). Respondent asserts that that contention by the General Counsel contradicts her position at the hearing and justifies Respondent's motion to strike the General Counsel's argument or to reopen the hearing to secure the testimony of the Board agent who took the prehearing statement. Where minor, the variations and omissions between a witness's testimony and a prior statement may well reflect, as the General Counsel argues, the aims and skills of an investigator. The same may not be said, however, of major variations or omissions and substantial contradictions between testimony and prehearing statements. The determination of what is a major or minor variation, omission, or contradiction

(continued...)

I make the following:[3]

Findings of Fact

I. Jurisdiction

Respondent has been at all times material a North Carolina corporation with a facility located at Lumber Bridge,

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[2](...continued)
and the weight to be accorded the same are matters to be determined by the administrative law judge. Accordingly, because I view the General Counsel's argument in her brief to be applicable only to minor variations, omissions, and insubstantial contradictions, I do not deem such argument to be a reversal of her position at hearing. Respondent's alternative motions are denied.

[3] On 17 April 1986, Respondent filed a motion to correct the transcript in certain respects. On 21 April 1986, the General Counsel filed an opposition. Having duly considered the matter, and because the correction proferred by Respondent comports with my recollection and is contextually consistent with the record, Respondent's motion to correct the transcript is hereby granted. Rogers Mfg. Co. v. NLRB, 486 F.2d 644 (6th Cir. 1973), cert. denied 416 U.S. 937 (1974). Respondent's motion and the General Counsel's opposition thereto are hereby entered into the record as ALJ Exhs. 3 and 4, respectively.

North Carolina, where it is engaged in the processing of raw poultry. During the 12 months preceding issuance of the complaint, Respondent received at its Lumber Bridge facility goods and raw materials valued in excess of $50,000 directly from points located outside the State of North Carolina, and during the same period of time, shipped from its Lumber Bridge facility products valued in excess of $50,000 directly to points outside the State of North Carolina. The complaint alleges, Respondent in its answer admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. Status of the Charging Party

The consolidated complaint alleges that the IUD is a labor organization within the meaning of Section 2(5) of the Act. Respondent in its answer denied the allegation. Based upon the credible testimony of Michael Black, Coordinator for the IUD, the IUD is a department of the AFL-CIO and is funded by the membership of AFL-CIO affiliates. The IUD has a constitution and bylaws and is actively engaged in coordinating bargaining between its member AFL-CIO affiliates and employers of employees whom the affiliates represent. Further, the IUD is actively engaged in organizing efforts among employees on behalf of its member affiliates. While involved in such organizational activities on behalf

of affiliates, it is the affiliate rather than the IUD which seeks to achieve collective bargaining representative status. See e.g., Burlington Industries, Inc., 257 NLRB 712 (1981).

I find, as the General Counsel at the hearing admitted, that the labor organization status of the IUD under the Act is irrelevant to the resolution of the issues in this case. There is no contention in this case that the employees discharged were engaged in activities on behalf of the IUD. I therefore find it unnecessary to decide whether the IUD is a labor organization under the Act.

Respondent argues that because the IUD has not been established as a labor

organization the record does not establish that it is qualified as a "person" within the meaning of Section 2(1) of the Act and therefore was not entitled to file a charge. Since the IUD is not a proper charging party the complaint, Respondent asserts, must be dismissed. I find the argument to be without merit.

Section 2(1) of the Act states the term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers. The word "includes" in Section 2(1) has been construed as a term of enlargement rather than limitation. American Federation of Television and Radio Artists v. NLRB, 462

F.2d 887 (D.C. Cir. 1972). Section 102.1 of the Board's Rules and Regulations, Series 8, adopts the Section 2(1) definition of "person," and Section 102.9 of the Rules and Regulations provides that a charge may be made with the Board by "any person." In the instant case, the charges were filed by Jeffrey P. Sweetland, an attorney for IUD. As an attorney he falls within the statutory definition of a person in Section 2(1) by virtue of his status as "legal representative" of IUD regardless of the IUD's status as a labor organization or any other type of organization. National Maritime Union of America, 245 NLRB 149, fn. 1, (1979). I therefore find the charges properly filed.

III. The Alleged Unfair Labor Practices

A. Background

Respondent employs approximately 450 employees in its Lumber Bridge facility. In the fall of 1984, the employees, becoming discontent with their working conditions, formed a group called the Employees Concerns Council. This group sought the assistance of another group called the Roberson County Clergy and Laity Concerned in Lumberton, North Carolina. A number of meetings were held between the Employee Concerns Council and Respondent. A number of matters were resolved, but a number of matters were left unresolved as reflected by a letter from the Council to Respondent on 27 June. According to the testimony of former employee Margaret

Johnson, an alleged discriminatee herein, the Concerns Council also contacted the Wage and Hour Division of the Department of Labor in July concerning Respondent's use of line cards.[4] An investigation by that agency resulted in the conclusion that employees had been underpaid, and Respondent was required to issue backpay to a number of employees.

One of the employees' concerns, their desire for a wage increase,[5] was never resolved. Margaret Johnson testified, without contradiction, that

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[4] There was no evidence herein that Respondent was aware that the Council was responsible for the Department of Labor investigation.

[5] As of August, Respondent's employees had not received a wage increase for a period of approximately 3 1/2 years.

she was an elected spokesman of the Concerns Council and added that she as an employee had met with Walter Geiger, Respondent's general manager, on 23 August at his request to discuss a safety problem. During the same discussion, Johnson testified she again raised the subject of a raise for employees asking Geiger if he couldn't at least promise employees a raise in the future if Respondent started making more money. Geiger rejected the suggestion saying he didn't want to raise false hopes, and alluded to the fact previously revealed to employees generally that one of Respondent's primary owners was involved in bankruptcy proceedings.

B. Strike Discussions

It is undisputed that a number of officers of the Employees Concerns Council and rank-and-file employees met on 19 August at the home of Margaret Johnson. These included, inter alia, Johnson, Vivian Godwin, president of the Council, and employees Patsy Clark, Jeanette Townsend, and Mildred Shaw. The meeting was also attended by Jasper Oxendine, a supervisor of Respondent who apparently was sympathetic to the employees. According to Johnson, employee concerns were discussed and the subject of a walkout or sit-down was raised. Oxendine, still according to Johnson, suggested that the employees wait before taking any such action in order to allow him to determine which

time or day such action would be most effective.

A subsequent meeting of employees was held on 22 August at a place referred to as the Oakridge School. The meeting was attended by generally the same employees who attended the meeting on 19 August. It was also attended by Thomas Jones and Johnny Jacobs, local clergymen who were formerly associated with the Concerned Laity in Lumberton. Employees again discussed a walkout. Oxendine did not attend this meeting, but Johnson told the approximately 25 employees at the meeting that she had been told that the following Tuesday would be a large volume day for Respondent and that would be a good day for the sit-down or walkout. Johnson testified, however, that there

was no final decision reached regarding a walkout or strike. Rather, according to Johnson, a walkout or strike on 27 August was to be dependent upon securing support of such action from other employees. Thus, the employees at the meeting were to go back and solicit the support of other employees so that any strike action would be more effective.[6]

C. The Discharges

It is undisputed that around 4 p.m. on 26 August, four employees of

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[6] Johnson, while at times confused, appeared to be the most knovledgeable of the General Counsel's witnesses. She had reasonably good recall, and was a more articulate witness. Most importantly, and although she was occasionally equivocal, she impressed me as candid and honest. Accordingly, Johnson is credited wherever she contradicts the testimony of the other General Counsel witnesses regarding what took place at the 19 and 22 August meetings and regarding whether a strike had been tentatively scheduled at the 22 August meeting.

Respondent, Jeanette Townsend, Patsy Clark, Diane Williams, and Brenda Smith,[7] were called into the office of Frank Watts, Respondent's processing manager, where, based upon the testimony of Townsend, Clark, and Williams, they were told they were discharged for "soliciting a strike up and down the line." Shortly thereafter on the same day, Townsend reported the matter telephonically to Johnson who told Townsend that the other employees were "behind" the dischargees.

Respondent disputes the basis for the discharge as related by Townsend, Clark, and Williams. Thus, Watts testified that around 4 p.m. on 26

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[7] Also referred to in the record as Gwendolyn Smith.

August, employee Isiah Jackson told him that there was going to be a walkout the following morning. Watts asked who and Jackson named Townsend, Clark, Williams, and Smith. Watts asked why they were walking out, and Jackson replied that it was "because they have kind of slipped too many orientals or Koreans in."[8] Watts asked about the time the walkout would take place and was told by Jackson that it would take place at 8 a.m. when "the chickens will be throughout the plant." Jackson repeated his allegations to Geiger in Geiger's office in the presence of supervisor Pauline Locklear

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[8] The record reflects that Respondent had employed six Koreans, relatives of army personnel at Fort Bragg near Fayetteville, North Carolina. While the record suggests these hires were made during the summer, it does not reflect the exact dates of hire.

who had just reported to Geiger the fact that she too had heard talk among employees of a strike to take place the next day.

Watts testified Geiger told him to discharge the four employees named by Jackson, and Watts called them in and did so. In doing so, Watts said he only told them they were discharged for breaking Plant Policy Number D-16 and read that policy to them. While the specific language of D-16 was never put in evidence, Watts related that it prohibited "restriction of output and intimidating others to try to stop output." Only Townsend had responded and said, "Do you want the boys?" Watts did not reply and instead told them to leave the premises and escorted them to the

plant gate. Of the four, still according to Watts, only Smith asked to talk to Geiger, and Watts reported the request to Geiger.

Respondent's witness Isiah Jackson corroborated Watts testimony regarding what he told Watts except he denied he told Watts the hour the strike was to begin. With respect to the conduct of the discharged employees, Jackson testified generally that he had been involved in a discussion with the four at the "clean-up" station in the plant. He further testified in general and conclusionary terms without specifying individual speakers that "they" talked about the hiring of the Koreans and Townsend, Williams, and Clark asked if Jackson was going to participate in the

walkout. Further, "they" discussed a strike at a turkey plant in Raeford, North Carolina where employees had walked out for more money and hiring Koreans instead of local people.

Geiger testified that when Jackson was brought to his office, Jackson related the four had wanted him to walk out with them because of Respondent hiring too many Koreans. It was at that point that Geiger directed Watts to fire the four under rule D-16, adding that no one was going to tell Geiger that he could not hire Korean nationals. It was only after the discharges were effectuated that Jackson also revealed to Geiger that Jackson "mentioned" that the four also wanted "more money" in addition

to being angry because Respondent was hiring Koreans.

Upon being advised by Watts that Smith had wanted to talk to him, Geiger arranged to meet with her on the afternoon of 27 August. He testified she reported that she had been present with the other three discharged employees in the discussion with Jackson but had said nothing. Geiger told her he would check out her statement. Having confirmed with Jackson that Smith had said nothing about walking out over the hiring of Koreans, Geiger, on 28 August, reinstated Smith and gave her backpay.

Smith did not testify in this case. Clark, Townsend, and Williams all denied asking any employees on 26 August to strike and specifically denied talking to

Jackson about a possible walkout. All three testified they asked to see Geiger about their being fired but their request was denied. Williams persisted in her efforts to see Geiger in the days immediately following the discharges and was finally successful on 31 August when she met with Geiger at the plant. According to Williams, Geiger stated he had three witnesses who told him she was going down the line "soliciting" but Geiger refused to name them. He refused to reinstate Williams and told her if she got another job, "Don't be a baby cryer." Williams asked why he had hired Smith back, and Geiger replied that he had needed her.

Geiger denied ever talking to Williams after 26 August.

D. The Strike

The morning of 27 August, news of the discharges spread among the employees. Johnson testified that she talked to employees concerning the discharges and told several to spread the word that they were walking out at 8 o'clock a.m. That time was chosen because by that time all employees would have reported to work and Respondent would be in full operation with its largest number of chickens on the line. At 8 a.m., approximately 100 employees walked out of the plant and milled around outside in the parking area. After a few minutes, General Manager Geiger came out to the group and told them that they had only a few minutes to return to work or

they would be replaced.[9] Approximately 50 employees did return to work while the remaining employees went outside the facility gate and met Townsend, Clark, and Williams. They made picket signs and began to picket. Margaret Johnson testified without contradiction that the picket signs used various legends including, "Support Us," "Support Us On Our Strike," "Support Our Cause," "Unfair Labor Practices," and "More Money For Me and My Family."

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[9] Margaret Johnson testified with some equivocation that Geiger said if the employees did not return to work, they would be "fired." The other General Counsel witnesses consistently testified that Geiger said they would be "replaced" and the complaint does not allege that the strikers were fired on 27 August. I find Johnson was in error in her testimony on this point and find that Geiger used the word "replaced" rather than "fired" in talking to the strikers.

The strikers were at some point during 27 August joined by Jacobs and Jones on the picket line. However, neither Jones nor Jacobs testified herein. It was Jones, according to the uncontradicted testimony of IUD Representative Michael Black, who contacted Black on 28 August regarding the strike and asking Black if he would meet with the strikers and give them some assistance. Black did meet with the strikers before noon on the 28th. After talking to the employees and learning of the discharge of the four employees for "soliciting a strike," Black told the employees that he believed they were engaged in an unfair labor practice strike. He further told them, however, that they did not have enough people

supporting their strike to win it, and that it was in their best interest to make an unconditional offer to return to work. He told those strikers present to try to get all their supporters there the next day and he would explain to them what to do. The following day, 29 August, Black returned to the picket line and explained to the employee strikers the same thing he had said before and asked them if they wanted him to make an offer on their behalf to return to work. According to Black,[10] employees

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[10] Black impressed me as credible and straightforward. That he was orally or by show of hands given authorization to make the offer to return to work was supported by several of the General Counsel witnesses including Margaret Johnson, Christine Chavis, Mildred Shav, Mary Shav, Vernice Johnson, and Ola McBryde. The testimony of Teresa Ray and Rosie Campbell, strikers called by Respondent who testified they were not aware of any such authorization given to

(continued...)

authorized him to make an offer to return to work on their behalf. To this end by mailgram dated 29 August, Black advised Respondent:

> I am coordinator of the Industrial Union Department, AFL-CIO. I have been designated as spokesman for the workers involved in an unfair labor practice strike at your facility. On behalf of the striking employees, I am making an unconditional offer to return to work on August 30, 1985 at 6 o'clock a.m.

Geiger responded by telegram on 29 August stating:

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[10](...continued)
Black, is not viewed as specifically contradicting Black and the other witnesses. Ray's testimony does not preclude the possibility that Blackwell was at the picket line when Ray was not there. Moreover, she conceded that on 29 August she was told the strike was over because there was not enough employee support. Campbell, contrary to Ray, related that she had seen a person at the picket line who was identified as a union man. Campbell also conceded that she had heard that a telegram was going to be sent to Respondent and admitted she had been told to go back to work.

> The employees referenced in your telegram have been permanently replaced. I will respond in greater detail upon receipt of your written communication.

Further, by letter to Black dated 30 August, Geiger stated:

> I am in receipt of the confirmation copy of your mailgram of August 29, 1985. Your organization is neither certified by the National Labor Relations Board nor recognized by this company as the representative of any group of employees associated with this facility. Additionally, we have no actual or constructive notice of your "designation as spokesman" for any such group. Therefore, pursuant to the National Labor Relations Act and the laws of the State of North Carolina, we consider the offer set forth in the above referenced mailgram to be invalid.
>
> Also, please note that there is no unfair labor practice strike occurring at this plant.

Consistent with the offer in his telegram, Black told employees to report back to work on the morning of 30 August.

In accordance with Black's instructions, the strikers assembled in an autocaravan and attempted to report for work on the morning of 30 August. It is undisputed, however, that Respondent's guard, Ronald Chance, pursuant to instructions from General Manager Geiger, told the lead car of the returning strikers driven by Vivian Godwin that no strikers could come back on plant property and if they did they would be arrested.

After the strikers were turned away at the plant, they went to the home of Margaret Johnson where a list of the strikers was prepared[11] and arrangements were telephonically made with the plant

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[11] It appears that the names of the strikers set forth in paragraph 13 of the complaint as being denied reinstatement was taken from this list.

for the employees to receive their pay due them for work prior to the strike.

The General Counsel does not contend nor does the complaint specifically allege either that the strikers were discharged or that they were not in fact replaced prior to the time of Black's telegram of 29 August.

E. The Post Strike Discharges of Margaret Johnson and Vivian Godwin

The complaint alleges that Margaret Johnson and Vivian Godwin were discharged in violation of Section 8(a)(1) of the Act following their reinstatement after the strike. The General Counsel's evidence shows that subsequent to the conclusion of the strike, Respondent wrote the former strikers advising them that they would be recalled when a job

was available if they so desired.[12] When Margaret Johnson received such a letter, she indicated to Respondent that she desired to be recalled to an available job. On 11 October, she was called to the plant and was offered a job of stacking boxes after being given an opportunity to see the job in operation. Johnson was told to report for work on 14 October. After a few minutes on the job, Johnson discovered that it was beyond her physical capabilities. Accordingly, she complained to her supervisor, Pauline Locklear, who then took Johnson back to the personnel department where she talked to Jackie Pate, personnel

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[12] The complaint alleged, and Respondent admitted, that of 48 strikers named in the complaint, 15 including Johnson were reinstated at various dates subsequent to the conclusion of the strike.

supervisor. There Johnson was offered a position in the ice house, and she accepted it. She was thereupon taken to the ice house where she worked until noon time with a male employee shoveling ice onto a conveyor or auger which distributed the ice to points where needed in Respondent's facility. Such ice was necessary for the preservation of the raw chicken product.

After lunch the male employee was removed from the ice house and put back on his regular job. At around 1 p.m. according to Johnson's testimony, Locklear came and told Johnson that she wasn't keeping enough ice on the floor. Johnson replied that she was doing her best. Subsequently however, around 2 p.m. Locklear replaced Johnson with a

male employee and took Johnson back to the personnel office where she was terminated for not keeping up with her job.

Respondent's evidence with respect to the discharge of Johnson was set forth in the testimony of Locklear who did not dispute much of Johnson's testimony. While acknowledging that Johnson worked with another employee in the ice house most of the morning, Locklear related that the ice house job was not normally performed by two people. Only on Fridays when the ice supply had receded from a point more distant from the auger did the job call for two people. Further, Locklear said that she had successfully worked the ice house job herself previously although she had not worked at

the job for more than an hour at a time. After the male employee was removed from the ice house Locklear ascertained that there was insufficient ice coming out into the plant so that the temperature gauges on the product indicated the product was getting hot. She then reported to Johnson that the temperature was rising and Johnson said okay she would put more ice in the auger. Locklear had noted that Johnson was not taking a full shovel full to the auger. Notwithstanding telling Johnson of the problem, the temperature continued to rise, and the federal government inspectors in the plant retained some product coming from the chiller for being too warm. It was at that point that Locklear took Johnson back to the

personnel department where she was discharged.

Like Johnson, Vivian Godwin apparently responded to Respondent's post strike letter to strikers and indicated she desired to be recalled to an available job. Godwin testified that she was called in to work on 16 October where she talked to personnel supervisor Jackie Pate who offered her a choice of two positions, the ice house or box stacking. Apparently without resolving what job she was going to choose, she was sent to the supply room with Pauline Locklear. At the supply room, however, Godwin asked leave of Locklear to go move her car inasmuch as it was parked in the wrong location. Upon returning she and Locklear proceeded toward Godwin's job

but Godwin again asked leave to get a hairnet. Godwin proceeded back to the supply room where she talked to Judy Cummings, an employee who asked Godwin what job she was going to take. Godwin testified she replied she was going to take the ice house position. Godwin then left to locate Locklear. When she ultimately located Locklear again, Locklear told her to return to the personnel office. There Pate asked her if she had told Judy Cummings and Supervisor Dorothy McCollum that she was not going to stack boxes. Godwin related what she had told Cummings as set forth above, but Pate disputed it. Pate called in Supervisor McCollum and employee Cummings and asked if Godwin had not stated that she wasn't going to stack

boxes. McCollum affirmed that Godwin had told Cummings that she wasn't going to stack boxes. Godwin, a 14-year employee of the Company, protested that she hadn't refused any job. Pate replied that was the only job they had open. Godwin insisted that if that was all they had she would take it. Nevertheless, Pate told Godwin she was terminated for refusing the stacking job.

Godwin testified herein that she had a back problem and had been under a doctor's care and had referred to her back problem when talking to Pate. According to Godwin, Respondent knew that she had a back problem due to her previous submission of doctor reports to Respondent.

Locklear testified that she took Godwin back to the box stacking job, the only job available at the time. With respect to Godwin, Personnel Supervisor Pate testified, however, that when she had initially talked to Godwin by phone about returning to work, she had told her of the ice house job and the box stacking job but the former had been filled before Godwin reported to work. According to Locklear, there had been no discussion of any other job during the initial conference with Godwin that morning. Moreover, Godwin never mentioned any health problem in connection with box stacking. Subsequently, before Godwin was actually put to work, Locklear talked to Judy Cummings in the supply room in the

presence of Supervisor McCollum. Cummings reported that Godwin had said she wasn't stacking "no damn boxes." McCollum confirmed that she had heard the remark also. At that point, Locklear reported the matter to Geiger who told Locklear to terminate Godwin. Locklear then reported the matter to Pate in personnel and took Godwin to the personnel department where Godwin denied that she had said she was not going to stack any boxes but Pate called McCollum and Cummings in. They reported that Godwin had said she wouldn't stack boxes whereupon Godwin replied that she had said it but she didn't mean anything by it. She was thereupon terminated. Locklear conceded that Godwin had never started stacking boxes that morning.

Moreover, she conceded that Godwin had never specifically expressed her refusal to stack boxes to Locklear.

F. Arguments of the Parties

The General Counsel contends that any discussion among the employees regarding the possibility of a strike or even the solicitation among employees of support for a strike over working conditions was a concerted activity protected under the Act. Consistent with this position, the General Counsel argues that the discharge of Clark, Townsend, and Williams was unlawful because it interfered with their protected concerted activities in connection with soliciting support for the strike. Based upon the denials of Clark, Williams, and Townsend, of any

involvement in seeking strike support based upon Respondent's hiring of Koreans, the General Counsel insists that the three did not engage in any misconduct in connection with their otherwise protected activity. The three women having been discharged for "soliciting a strike" the discharge was violative of Section 8(a)(1), the argument continues. Since the discharge was violative of the Act and because the evidence reflects that the strike stemmed in part from those discharges, it is argued that the strike which began on 27 August was an unfair labor practice strike.

Since the strike was an unfair labor practice strike according to the General Counsel, the employees were

entitled to reinstatement upon their reconditional offer to return to work. Black's offer in that regard, which was rejected by Respondent, was a valid offer and therefore the refusal to reinstate the strikers constituted a separate violation of Section 8(a)(1) of the Act, the General Counsel contends. If there was any ambiguity in Black's offer for the strikers to return to work or any question as to his authority to make that offer, the matter should have been resolved by the strikers' efforts to return to work on 30 August which were rebuffed by Geiger through his instruction to the guard not to let any strikers on the premises.

Based essentially upon the testimony of Isiah Jackson, Respondent contends

that Townsend, Clark, and Williams were engaged in activity unprotected under the Act by encouraging employees to strike because of Respondent's hiring of Koreans. Respondent asserts that it would be unlawful for it to discriminate in hiring based upon the national origin of the applicant, and therefore claims any efforts of employees whether through concerted action or not to cause it to violate such a law must be held to be unprotected. For this reason, Respondent argues that its discharge of the three employees was lawful.

It is Respondent's position that even assuming the discharges of the three employees were unlawful, the strike which followed was not based upon the discharges but rather upon the

preexisting plans of the employees herein to strike on 27 August. Therefore, the strike could not have been caused by any unfair labor practices on Respondent's part. Moreover, even if the discharges were the cause of the strike, the strike was unprotected because it was in support of the unprotected activity of the three discharged employees. Finally, Respondent asserts that the strike was also not protected in any event because it was clearly timed to cause Respondent not only maximum financial harm but actual product loss or damage.

Respondent further argues that even if the strike was protected the strikers are entitled to status as economic strikers only. The offer to return to work made by Black was invalid because

Respondent claims the evidence does not show that employees specifically authorized Black to send his 29 August telegram. Respondent also asserts that since Black and the IUD was not certified and recognized as a representative of the employees, they did not possess the legal authority to make an offer for the employees to return to work. Additionally in this regard, Respondent asserts that the legal sufficiency of any attempted delegation of authority in making the offer depended not upon principles of agency but upon the scope of the IUD's representational rights under the Act. Since Respondent's employees were not represented by a union, the argument goes, Respondent citing Sears Roebuck and Co., 274 NLRB

No. 55 (1985) and Linden Lumber v. NLRB, 419 U.S. 301 (1974), claims it was free to deal with employees individually with respect to all terms and conditions of employment.

Respondent's position with respect to the discharge of Johnson was she was terminated for cause based upon her failure to perform the ice house job in a satisfactory manner causing Respondent to fail to meet USDA requirements. Similarly, Godwin was said to have been discharged for insubordinate conduct in stating she wasn't going to stack boxes.

G. **Analysis and Conclusion**

1. **The protected nature of the strike**

As already concluded, infra, the employees had decided, dependent upon

gathering further support, to engage in a strike action on 27 August prior to the discharge of Clark, Smith, Townsend, and Williams. The basic concerns which prompted the planned strike based on the credible testimony of Margaret Johnson related to working conditions and a wage increase. There was absolutely no evidence presented that any subjects discussed at the employee meetings on 19 and 22 August would indicate that the strike was related to employee concerns over Respondent's hiring of Koreans. I can only conclude that the concerns of the employees expressed in the strike discussions prior to 26 August were economic in nature, and, that a strike over such concerns would be within the protection of the Act.,

Arguing from the premise that the strike was based solely on economic concerns, Respondent asserts the strike was unprotected because of its timing which was designed to result in the greatest harm to Respondent. I find the argument to be without merit. Normally, planned employee strikes are timed to insure the greatest impact on an employer. And employers in anticipation of strikes build inventories and devise strategies to lessen the impact of strikes. Indeed, Respondent here, as admitted by Geiger, took steps on 26 August upon hearing of the strike possibility to lessen the impact of the strike on production the following day. The fact that the strike occurred during the work day when chickens were on the

line and vulnerable to loss does not mean employees automatically lost protection under the Act. Strikers are not required under the Act to institute the strike at a specific time of day. See e.g. First National Bank of Omaha v. NLRB, 413 F.2d 921, 925 (8th Cir. 1969); NLRB v. Solo Cup Co., 237 F.2d 521, 526 (8th Cir. 1956). The economic pressure flowing from such a strike must be weighed against the goals sought to be achieved by the strikers. See NLRB v. A. Lasaponara & Sons, Inc., 541 F.2d 992, 998 (2d Cir. 1976). While, based on Geiger's testimony, Respondent sustained some loss of its product on the line when the strike occurred, the extent of that loss separate from labor losses resulting from the strike was not clearly

defined on the record. To be weighed against such an indefinite loss are the strikers' legitimate concerns regarding their working conditions and pay. Here, as in NLRB v. Lasaponara & Sons, Inc., supra, the employees' efforts were not simply to inflict economic loss on Respondent without a compensatory gain for themselves. It is in this respect that Dobbs Houses, Inc. v. NLRB, 325 F.2d 531 (5th Cir. 1963), cited in Respondent's brief is distinguishable. There the strike action by waitresses at a busy dinner hour to protest the discharge of a supervisor was found unprotected by the Court because there was no compensatory objectives for the employees. In the case sub judice the evidence is undisputed that at least one

compensatory objective of the strike was a wage increase. Aside from stopping work the employees here did nothing affirmatively to cause physical damage to Respondent.

Moreover, considerable doubt is raised with respect to Respondent's present claim of damage resulting from the strike by a news release prepared by Geiger after the strike began. Thus, the news release states:

> Mr. Geiger went on to state, 'on Tuesday morning, ... 47 employees walked away from their jobs. We were informed that the timing of the walkout, in view of the fact that we were in full production, was calculated to cause the company monetary losses from product contamination and a supposed inability to meet customer's Labor Day weekend orders.' 'I might add,' he emphasized, 'that neither occurred . . . .'

In light of this statement, Geiger's claim of significant losses as a result of the timing of the strike appears to be substantially exaggerated if not entirely fabricated.

Accordingly, even if the strike was based only on economic considerations, I find nothing in the timing of the strike which would deprive employees of protection under the Act. I also find that no protection was lost by virtue of the strikers' failure to tell Respondent at the outset of the strike the basis for the strike. A specific demand need not be presented to an employer before a walkout can be protected under Section 7. Washington Aluminum Co., 70 U.S. 9 (1962). Daniel Construction Co., 277 NLRB No.81 (26 Nov. 1985). In any event,

Geiger was well aware that at least a wage increase was a concern of the employees when the walkout occurred for the Friday preceding the strike, Johnson had clearly expressed this concern to Geiger by suggesting that he promise the employees a raise sometime in the future. The suggestion was rejected. Moreover, although Geiger on the morning of the strike addressed the strikers and warned them to return to work, he did not attempt to ascertain the basis for the strike.

2. <u>The discharges as a cause of the strike</u>

The fact that the strike was preplanned and had economic goals does not preclude the strike from also being classified as an unfair labor practice

strike if unfair labor practices of Respondent contributed to the occurrence of, or prolongation of, the strike. NLRB v Pecheur Lozenge Co., 209 F.2d 393 (2d Cir. 1953), cert. denied 347 U.S. 953 (1954). A decision on whether the strike here was caused in any way by unfair labor practices on Respondent's part requires an initial determination of whether Respondent committed an unfair labor practice in the discharge of the employees on 26 August. That determination in turn requires close examination of the facts surrounding the discharges. Ascertainment of the facts is rendered more difficult because neither the General Counsel's witnesses or Respondent's were wholly convincing. The truth probably lies somewhere between

the versions of the respective sides. Clark, Townsend, and Williams were unpersuasive in their denials regarding soliciting Jackson or other employees to strike. Clark, having attended both the employee meetings the week prior to the strike, was unconvincing in her denials about a strike being discussed at those meetings. A lack of knowledge of what transpired at those meetings would require incredible naivete, and her eagerly stated flat denial on cross-examination that she was involved in any discussions on August 26 or previously with employees about a walkout was hollow and unbelievable. Townsend was at times evasive on cross-examination. She contradicted her prehearing statements on significant

points having to do with whether a strike was scheduled for 27 August and whether she talked to employees about a strike away from work.[13] Williams likewise was contradicted by her prehearing statements given the Board in material respects concerning whether the employees at the 22 August meeting scheduled a strike for 27 August. Further, she was evasive and unresponsive on cross-examination and exhibited a startling lack of recall.

On the other hand, Jackson, a convicted felon, in testifying for Respondent was in no way a model witness.

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[13] Townsend's denial of talking to employees generally about a strike was also disputed by employee Jimmy Simpson, a witness for Respondent who credibly testified without specific contradiction, that about 2 or 3 weeks prior to the strike, Townsend had talked to him about a strike in the presence of Clark saying the only way employees would be able to get more money was to "walk out together" and "to pull together.

Jackson's testimony was notable for its lack of detail. He attributed no specific remarks to any of the other three alleged participants in the conversation, and testified in vague, generalized, and conclusionary terms. This is exemplified by the following excerpts from Jackson's testimony:

> Q. Would you please tell us what was discussed in that conversation?
>
> A. What was discussed in the conversation was about a walkout and about the hiring of Koreans at the plant.
>
> * * *
>
> Q. To the best of your recollection, what was said in the conversation?
>
> A. Well, like I was saying, about the hiring of Koreans and they asked me was I going to participate in the walkout.
>
> * * *

Q. Did any one of them discuss any other walkout?

A. Yes.

Q. And what was that?

A. A discussion about the walkout that they had of the turkey plant.

Q. And where is the turkey plant located?

A. Raeford, North Carolina.

Q. And what reason was being given by these ladies at walking out at Turkey Farms?

A. More money and about the hiring of Koreans instead of local people around the area.

* * *

Q. Was there any other discussion about the hiring of Koreans?

A. Like just talking in general like, they are not hiring the local people but they are hiring them instead like replacing them like that, conversation like that.

The reference to the turkey farm and its relation to Respondent, if any, was not

explained in the record. On cross-examination, Jackson testified as follows:

> Q. Isn't it true that the only thing that Patsy Clark said was to ask you whether you were joining the walkout?
>
> A. She asked me if I was going to walk out with them.
>
> Q. And that's the only thing she had to say during the conversation, isn't that true?
>
> A. No.
>
> Q. What else did Ms. Clark have to say?
>
> A. The same what I said, about hiring, the local people, about hiring Koreans and not hiring the local people, that is what the whole conversation was about and more money.

However, Jackson admitted on further cross-examination that at a state unemployment compensation hearing he had testified that all Clark had asked him

was whether he was going to walk out with the rest of them.

The accuracy of Jackson's vague and generalized version is also brought into question by the undisputed fact that in reporting the matter to Watts and Geiger he had included Gwendolyn Smith in the group as having made the remarks now claimed to be the basis for removing employees from the protection of the Act. Yet, Jackson subsequently conceded that Smith had said nothing. Neither side in this proceeding called Smith. The General Counsel argues that I should draw an adverse inference against Respondent for not having done so. I decline to do so, for there was no showing that Smith was more available to Respondent than to the General Counsel.

The fact that she was still employed by Respondent made her no less available to the General Counsel. Nor does such employment create any presumption of bias on Smith's part against the General Counsel's case. Que Enterprises, Inc., 140 NLRB 1001, 1003 (1963).

Considering the foregoing, and because it is difficult to perceive how the hiring of six Koreans in the plant of 450 employees would be of any particular concern to employees sufficient to encourage strike action, I would not, without more, credit Jackson's testimony that any of the three dischargees complained of the hiring of Koreans in the pre-strike discussions with him. There is more, however. Thus, employee Yvonne Maynor testified for Respondent

that about 2 weeks prior to the strike, she had heard Clark, Townsend, and Williams in the breakroom complaining about "Koreans being hired, taking jobs they thought Americans should have." These complaints were not made, however, in the context of any strike discussions. Maynor impressed me as truthful and there was no showing of bias on her part against Clark, Townsend, and Williams. I credit Maynor. Having voiced the complaint before, I find it not unlikely that one of them would have alluded to the same complaint in discussing the matter with Jackson. On balance and considering the record as a whole, I credit Jackson's testimony over the denials of Clark, Townsend, and Williams and find that he had discussions

with them about a strike and that one or another of them asked him to participate in the strike and alluded in the discussions to Respondent's hiring of Koreans.

Having credited Jackson, however, I am nevertheless constrained to the view that misconduct on the part of the three which would remove them from the protection of the Act has not been established by Respondent. If it could be said that the dischargees here were seeking through strike action to cause Respondent to either discharge Koreans or to make a commitment not to hire any in the future for racial or national origin considerations, I would concur in Respondent's argument that such activity would be outside the protective mantle of

the Act as an attempt to cause Respondent to violate other laws such as Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e, et seq.) cited by Respondent. However, I cannot reach that conclusion based on Jackson's vague and conclusionary testimony when the employees' remarks may also be interpreted as compatible with lawful and protected aims. Such a lawful interpretation is revealed in Geiger's own pre-trial statement to the Board which shows that the reference to "foreigners" was in a significantly different context. Thus, Geiger in his statement said Jackson reported to him that four employees (including Smith) had asked Jackson to walk out with them the next morning because Geiger "was

hiring too many foreigners and they would work for anything." Considering that no demands had ever before been placed on Respondent to either discharge or refuse to hire Koreans or foreigners, and considered in the context of Jackson's concession herein that the dischargees had talked about walking out for more money, it is reasonable to conclude that the discharged employees' remarks were reflective of an economic concern rather than one based on race, national origin, or other irrelevant consideration. Under this interpretation, the conduct of the employees in soliciting strike support could not be regarded as unprotected under the Act for the objection to the foreigners was premised not on their

nationality but upon their depression of the wage rates.

Considering all the foregoing, I am persuaded that the misconduct attributed to Clark, Townsend, and Williams which Respondent contends deprived them of the protection of the Act has not been established. It is clear that Section 8(a)(1) is violated if an employee is discharged for misconduct in connection with a protected activity if the misconduct did not in fact occur and despite the employer's good faith belief to the contrary. NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964). Accordingly, and because there was no evidence that Clark, Townsend, and Williams in any other way interfered with their own work or the work of other employees during

their strike solicitations, I find Respondent violated Section 8(a)(1) of the Act as alleged in discharging them on 26 August.[14] Even assuming that the three dischargees had not been protected by the Act in their references to Koreans or foreigners in their remarks to Jackson, I find Respondent nevertheless violated Section 8(a)(1) of the Act in the discharges. It is well established that the existence of a basis for discharge is no defense to a discharge if in fact the discharge was nevertheless based upon another unlawful reason. Rose's Stores, Inc., 256 NLRB 550 (1981).

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[14] Although not alleged as a violation, it is clear that Smith's discharge would have violated the Act under Burnup & Sims, Inc., supra, for Respondent concedes she had not engaged in any misconduct and was, therefore, subsequently reinstated.

In the instant case, I am persuaded that it was not their remarks to Jackson about Koreans or foreigners which prompted the discharges but rather the efforts of the three in soliciting Jackson to strike. Only Geiger's self-serving testimony indicates that he discharged the employees because they were telling him he could not hire Koreans. Geiger's testimony regarding his motive was not substantiated by any other witness including Processing Manager Watts even though Geiger testified that when he told Watts to terminate the four, he also told him no one was going to tell Geiger not to hire "Korean nationals." Under these circumstances, Geiger's claim smacks of afterthought and I find it incredible. That Geiger was opportunistic and not

unwilling to stretch the truth was shown by a news release prepared by him during the strike in which he left the clear impression, admittedly contrary to the truth, that as the strike occurred, he offered to meet with the "employees" to discuss their grievances, but that nevertheless "47 employees" left the plant and began picketing.

Significant in concluding that references by the dischargees to Koreans or foreign nationals was not the motivating concern for their discharges is Respondent's failure to investigate or ascertain the position of the people accused of the misconduct. Geiger never asked for their version of the facts before deciding to discharge them. Such a failure coupled with Respondent's haste

in effectuating the discharges clearly indicates that Respondent was reacting to the strike solicitations rather than any particular remarks of the dischargees in connection with such solicitation.

Most revealing regarding Respondent's motivation in effectuating the discharges was its reliance upon its policy against restricting output and intimidating other employees. While Watts testified he did not use the word strike in announcing the discharges to the four employees, and I credit him in this regard, he conceded that he was in fact referring to the strike in applying Respondent's rule 16.[15] Yet, there was

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[15] Although I credit Watts regarding what he told the dischargees, it was not unreasonable for them to conclude from what he said that he was in fact discharging them for soliciting for a strike.

no evidence that the four discharged had restricted output or had intimidated others. There was no showing that those discharged were interfering with Jackson's work on their own in talking to Jackson. Thus, the rule relied upon had no application to the circumstances except to the extent that a strike, if successful, would have the necessary effect of restricting output.

Finally, the discharged employees were never told the reason now relied upon by Respondent for justifying the discharges, i.e. the alleged misconduct in complaining that Respondent was hiring Koreans or foreigners. The failure to so tell the discharged employees, in the absence of some credible explanation not set forth in the record, clearly

indicates that such reason was not relied upon. Even when Williams talked to Geiger on 31 August at the plant, Geiger complained to Williams only of her having gone down the line "soliciting." Based on Williams' testimony, which I credit in this instance,[16] there was no reference by Geiger to the dischargees complaining about the hiring of Koreans or foreigners.

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[16] While Williams cannot be described as a wholly candid witness, I did not perceive her testimony about the meeting with Geiger to be a fabrication, particularly since Geiger's denial of any meeting with Williams after the strike was not convincing. Further, although called as a witness by Respondent, security guard Ronald Chance did not testify about, and failed to refute, Williams' visit to the plant on 31 August, even though Williams identified "Ron" as the guard who let her in to see Geiger on that day. It seems reasonable to infer from Chance's failure to rebut Williams' testimony that she did meet with Geiger as she claimed. Under these circumstances, I find Williams' testimony regarding the fact of the meeting with Geiger and his remarks in the meeting are credible.

Considering the foregoing and the fact that at the time of the discharges, Respondent had specifically identified only the four dischargees as strike solicitators, and because I find Geiger's unsubstantiated testimony regarding his motivation in effectuating the discharges unpersuasive, I conclude Respondent has not demonstrated that it relied upon any unprotected aspect of the strike solicitations of the discharged employees. For this reason I conclude that, even assuming misconduct on the part of the dischargees in connection with activity otherwise protected under the Act, Respondent discharged them not for such misconduct but for their protected activity of soliciting or encouraging other employees to strike.

In this regard, I conclude Respondent violated Section 8(a)(1) of the Act as alleged.

Having found that Respondent engaged in unfair labor practices under the Act in the discharges, there remains the issue of whether the unfair labor practices were a contributing cause of the strike on 27 August. It is sufficient that the strike was caused at least in part by Respondent's unfair labor practices. See e.g. Daisy's Originals, Inc. of Miami, 187 NLRB 251 (1970). Based on Margaret Johnson's credited testimony, the strike, while preplanned, was essentially conditional on garnering further support from employees. Further, Johnson related that she did not believe the strike would

have occurred in the absence of the discharges because employees didn't have the "nerve." This assessment was probably accurate since only a fraction of Respondent's work force joined the strike even in light of the discharges. In any event, Johnson testified without contradiction that she discussed the discharges with several other employees at work on the morning of 29 August and asked them what they were going to do about it. She added that she got responses indicating a willingness to walk out so she advised them to "spread the word and tell everybody, you know, at 8:00 o'clock we will be walking out."

Christine Chavis, a witness for the General Counsel, testified credibly that she learned of the discharges on the

morning of 27 August and upon seeing the walk out begin decided to go with the strike. Similarly, striker Mildred Shaw who learned of the discharges on the evening they occurred testified that the next day at work when the walkout started, the employees working next to her told her to "come on, they're going to strike to support our coworkers."

Finally, based on Margaret Johnson's testimony, uncontradicted in this regard, among picket signs used were those containing language referring to "Unfair Labor Practices." Johnson testified, again without contradiction, that as spokesman for the Concerns Council she told newspaper reporters and others that the strike was to support the four girls who were fired, for better working

conditions in the plant and for more money. In view of the above, and while not all strikers may have been aware of the discharges prior to the strike, I conclude the record fully supports the conclusion I reach here that the strike was caused at least in part by the discharges, and that for this reason the strike must be classified as an unfair labor practice strike from its inception.

3. <u>The validity of the offer to return to work</u>

Concerning the validity of Black's offer of 29 August for the employees to return to work, Respondent argues that many strikers were not aware of the offer to return to work, that no record was made of employees specifically granting

authorization for the offer, that the offer may have been sent before any authorization was given, and lastly that the offer must be held invalid because neither Black nor the IUD was certified or recognized as the collective bargaining representative. In connection with the latter argument which appears to contradict Respondent's contention elsewhere herein that the IUD is not a labor organization, Respondent asserts that to have accepted the validity of the work return offer, it would have had to deal with the IUD, a situation Respondent was legally privileged to avoid under Sears, supra, and Linden Lumber, supra. Having credited Black regarding the circumstances of his sending the offer to

Respondent, I find Respondent's initial arguments to be without merit. The fact that each striker did not grant Black specific authorization to send the telegram is immaterial for it is clear that the strike was over, and any picketing ceased commensurate with the sending of the "offer." There was no evidence that the strike continued, or that any employees insisted upon a continuation of the strike. Nor was there evidence that any employees objected to the offer to return to work.

I likewise reject Respondent's legal argument and find the Sears and Linden Lumber cases inapposite. Sears dealt with, and upheld, an employer's right to deal directly with employees in investigatory interviews where no union

representative of such employees has been certified or recognized. Linden Lumber involved the right of employers to refuse to grant recognition to a union based on union authorization cards in the absence of unfair labor practices precluding a fair election. Neither situation is present in the instant case. Moreover, while an employer may not be compelled to recognize or negotiate with a minority union, the Board and courts have specifically held that nothing in the Act precludes a minority representative from acting as the employees' agent for the purpose of requesting reinstatement. See F. M. Homes, Inc., 235 NLRB 648 (1978) and cases cited therein at fn. 4. See also Hendon & Co., Inc., 197 NLRB 813 (1972). Respondent would distinguish the

case herein from the foregoing line of cases as well as Marlene Industries Corp., 255 NLRB 1446 (1981), enf. denied, 712 F.2d 1011 (6th Cir. 1983), cited in the General Counsel's brief, on the grounds that in the cited cases the employer knew the union making the return to work offers represented the striking employees even if such union did not enjoy majority representative status among the employer's employees generally. Regardless of whether this is a valid distinction, Geiger admitted that in view of Black's mailgram he "assumed that [the strikers] would attempt to" return to work, and responded by instructing his guard not to allow the "walkout employees" to return. Instead, he told the guard that if they trespassed to call

the police and have them arrested. Thus, Geiger treated the offer as a valid one. And, any doubt as to the validity of the return to work offer should have been resolved by the actual attempt of the employees to return to work on the morning of 30 August.[17]

In any event, and assuming some doubt by Respondent regarding the validity or conditional status of Black's return to work offer, it was incumbent upon Respondent to clarify the matter with the strikers when they appeared at the plant to go to work. Certainly,

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[17] Even the identity of the individual strikers attempting to return to work on 30 August was known to Respondent for Geiger admittedly told guard Ronald Chance to make a list of those attempting to return. That list, according to Geiger's belief as related at the hearing, was no longer in existence at the time of the hearing.

Respondent was free to explore the matter with the individual strikers. Respondent's failure to do so precludes it from now complaining, and any uncertainty regarding Black's offer of the strikers return to work must be resolved against Respondent. Haddon House Food Products, Inc., 242 NLRB 1057, 1058 at fn. 6 (1979), enf. as modified on other grounds, 640 F.2d 392 (D.C. Cir. 1981). Accordingly, I conclude Black's offer on behalf of the strikers was valid and unconditional.

Since the return to work offer was valid and because I have found that the strike was based from its inception at least in part upon the unfair labor practices of Respondent, the strikers were entitled to their jobs when they

attempted to return to work on 30 August even if they had been previously replaced and even if it was necessary for Respondent to discharge the replacements. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956). It is clear that they were not allowed to do so by Respondent. In failing and refusing to reinstate the strikers named in the complaint upon their offer to return to work, Respondent violated Section 8(a)(1) of the Act as alleged. See generally, San Isabel Electric Services, Inc., 225 NLRB 1073 (1976).

4. The discharges of Johnson and Godwin

Since I have found above that the strikers were entitled to reinstatement to their old positions in view of their

status as unfair labor practice strikers and their valid offer to return to work, the burden was upon Respondent to reinstate them to their old positions. It is clear that neither Margaret Johnson nor Vivian Godwin were reinstated to their former positions after the strike. Prior to the strike, Johnson had been a gizzard cleaner while Godwin worked on the eviscerating line, stabbing, washing, and cleaning knives. There was no evidence that these jobs had been abolished during the strike or that the box stacking and ice house jobs were substantially equivalent to the prestrike jobs of Johnson and Godwin. In these circumstances, I must conclude that neither of the two were ever properly reinstated by Respondent, and that

Respondent must fulfill its obligation to reinstate them.

In view of Respondent's failure to properly reinstate Johnson and Godwin and because Respondent violated Section 8(a)(1) in failing and refusing to reinstate the strikers, it would appear to be unnecessary to decide whether Respondent's discharge of either Johnson or Godwin from the jobs to which they were assigned on 14 and 16 October, respectively, was based upon their involvement in, or leadership of, the strike. Never having been properly reinstated, the Order providing for the backpay and reinstatement of the unfair labor practice strikers provided below includes Johnson and Godwin. However, a failure to decide the issue of their

discharges would leave the complaint allegations on these points unresolved and an inadequate basis for Board review of the merit of the allegations. Thus, the legality of the discharges of Johnson and Godwin will be undertaken below.

There is little dispute concerning the facts surrounding Johnson's discharge. She was offered one position, found she could not perform the work, and was offered a second job in the ice house. While the General Counsel makes much of the fact that Respondent had never previously assigned a woman to work alone in the ice house, there was no evidence that the job could not be performed by a woman. Moreover, there was nothing in Johnson's testimony suggesting the job was too difficult for

her. Finally there was no evidence to contradict Locklear's testimony, which I credit in this regard, that not enough ice was being dispensed from the ice house to the work floor to keep the product properly chilled. There appears to be a legitimate basis for finding fault with Johnson's work. Considering the foregoing, the fact that Locklear warned Johnson once before the discharge that not enough ice was coming to the floor, and that Locklear had previously discharged employees for the same offense as Johnson, and although the discharge is suspicious, I conclude that the evidence was insufficient to establish that the discharge was based upon Johnson's prior protected concerted activity. I, therefore, find no violation of Section

8(a)(1) of the Act in Johnson's discharge from the ice house job.

With respect to Godwin's discharge, I find the facts to be those related by Respondent's witnesses Pate, McCullum, and Locklear. Godwin appeared nervous and uneasy while testifying, an appearance not fully explainable as resulting from an illness she claimed to be experiencing. Not surprisingly she exhibited her greatest discomfort during cross-examination. She was contradicted by her prehearing statement to the Board regarding a significant aspect of her testimony, the decision of employees at the 22 August meeting to strike on 27 August. Accordingly, I do not find Godwin fully credible. I find Godwin did tell Judy Cummings within the hearing of

Dorothy McCullum[18] that she wasn't going to stack "no damn boxes." As the General Counsel argues, however, there remains an element of disparate treatment in Respondent's discharge of Godwin. Thus, Pate conceded that she had initially told Godwin, as she had told other former strikers, that if she didn't believe she could perform a job in which Respondent had openings, Respondent would call her when they had another opening. And, as in the case of Johnson, Respondent allowed employees to attempt a job before rejecting it. Further, employee and former striker Mary Shaw credibly testified that she had rejected

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[18] It is not fully clear from the record that Godwin directed her remarks about the job to McCullum. It is my sense of the record and testimony that McCullum simply overheard Godwin's remark which was directed to Cummings.

the box stacking job without penalty. The manner of Godwin's purported rejection of the box stacking job is hardly a reason for this disparity in treatment. Godwin did not specifically tell Locklear who was to be her supervisor she was rejecting the job. There was no refusal to obey a direct order. Nor did Godwin direct any insubordinate language at Locklear. Indeed, it was not even Locklear's decision to discharge Godwin. It was Geiger's. Given Godwin's known position in the Employees Concerns Council and her strike participation, Respondent's disposition to retaliate against those perceived to be instigators of the strike as demonstrated in the discharges of 26 August, Godwin's long period of

prior employment with Respondent,[19] the minor nature of Godwin's offense, and the failure to grant her a job rejection privilege accorded other returning strikers, compels me to conclude that the General Counsel has established a prima facie case that Godwin's discharge was based upon her prior protected activity. Further, in the absence of evidence that other employees guilty of offenses like or similar to Godwin's were similarly so harshly treated, I find Respondent has not demonstrated that Godwin would have been discharged without regard to her protected activity. Accordingly, I conclude that Godwin's discharge interfered with her Section 7

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[19] Godwin had been employed by Respondent for about 14 years.

rights in violation of Section 8(a)(3) of the Act as alleged.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By discharging employees Patsy Clark, Jeanette Townsend, and Diane Williams on 26 August 1986, and employee Vivian Godwin on 16 October 1985 because of their involvement in activity protected under the Act, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. Respondent did not violate the Act in the discharge of Margaret Johnson on 14 October 1985.

4. The strike which began among Respondent's employees on 27 August 1985 was an unfair labor practice strike from its inception.

5. By failing and refusing to properly and timely reinstate unfair labor practice strikers listed below upon their unconditional application for reinstatement, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act:

Diane Bell	Brenda McBryde
Leacher Bilbo	Dazza McBryde
Sarah Brooks	Ola McBryde
Barbara Bullard	Gladys McDonald
Rosie L. Campbell	Barbara McDougald
Vanessa Campbell	Jonathon McEachin
Christine Chavis	Shirley McEachin
Vickie Chavis	Johnny McGougan
Barbara Collins	Judy McNeill
Delphine Edwards	Joann Miller
Vivian Godwin	Charlene Pearson
Margaret Johnson	Teresa Ray
Vernice Johnson	Eddie Shaw
Sandra Judd	Mary Shaw

Annette Locklear	Mildred Shaw
Geneva Locklear	William Shaw
Gloria A. Locklear	Carrie Simpson
Ruby A. Locklear	Barbara Smith
Shirley Locklear	TeWanda Spearman
Gloria Mainor	Kunehona Visessing
Helen McAllister	Eva Watkins
Johnnie McAllister	Gloria Williams
Martha McArn	Mary Willis

6. The unfair labor practices described above in conclusions 2 and 5 affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent did not engage in any unfair labor practices other than those found herein.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged Patsy Clark, Jeanette Townsend, and Diane Williams, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in F.W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in Florida

Steel Corporation, 231 NLRB 651 (1977).[20] Consistent with the Board's holding in Sterling Sugars, Inc., 261 NLRB 472 (1982), it will also be recommended that Respondent be required to expunge from its records and files any reference to the discharges of the above-named employees and notify them in writing that this has been done and that evidence of the unlawful discharges will not be used for future personnel actions against them.

Having found that Respondent unlawfully failed and refused to reinstate the unfair labor practice

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[20] See generally Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

strikers listed in the appendix[21] following their unconditional offer to return to work, it shall be ordered that Respondent, to the extent it has not already done so, offer them immediate and full reinstatement to their former positions, or, if such positions no longer exist, to substantially equivalent positions without loss of seniority or other benefits and make them whole for any loss of pay resulting from

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[21] Shirley A. Locklear was listed in paragraphs 12 and 13 of the complaint as having been a striker. Respondent's answer denied the pertinent portions of both complaint paragraphs. The list of strikers made at the home of Margaret Johnson on 30 August (G.C. Exh. 3) lists no Shirley A. Locklear although it does list a Shirley A. Williams. Accordingly, and since there is no independent evidence that Shirley A. Locklear was a striker, I shall omit her name from the Appendix. I shall leave for compliance processing the determination of whether Locklear was inadvertently alleged in the complaint instead of Shirley A. Williams.

Respondent's failure to properly reinstate them by payment of a sum of money to them equal to the amount they normally would have earned as wages from the effective date of their unconditional offer to return to work, 30 August 1985, to the date of a bona fide offer of reinstatement by Respondent or their actual reinstatement as the case may be, less any net interim earnings. The backpay and interest shall also be computed in accordance with the authority cited in the paragraph immediately above.[22]

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[22] The General Counsel in her brief sought also a "visitorial clause" in effect allowing the Board to engage in discovery under the Federal Rules of Civil Procedures in order to monitor compliance. However, no special circumstances are asserted or argued to justify such a clause. The Board has previously indicated such clauses will not be granted in a pro forma manner. See (continued...)

On the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended:[23]

ORDER

Respondent, Lumbee Farms Cooperative, Inc., Lumber Bridge, North Carolina, its officers, agents, successors, and assigns shall:

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[22](...continued)
O. L. Willis, Inc., 278 NLRB No. 29 (23 January 1986); 278 NLRB No. 88 (16 February 1986). Compare Hilton Inn North, 279 NLRB No. 9 (31 March 1986). In the absence of any special circumstances shown here, no visitorial clause will be provided.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities under the Act for mutual aid or protection.

(b) Failing or refusing to reinstate either in a timely manner or at all unfair labor practice strikers upon their unconditional application to return to work.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Patsy Clark, Jeanette Townsend, Diane Williams, and to the extent it has not already done so, the below-named employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make then whole in the manner set forth in the section of this Decision entitled "The Remedy."

Diane Bell	Brenda McBryde
Leacher Bilbo	Dazza McBryde
Sarah Brooks	Ola McBryde
Barbara Bullard	Gladys McDonald
Rosie L. Campbell	Barbara McDougald
Vanessa Campbell	Jonathon McEachin
Christine Chavis	Shirley McEachin
Vickie Chavis	Johnny McGougan
Barbara Collins	Judy McNeill
Delphine Edwards	Joann Miller
Vivian Godwin	Charlene Pearson
Margaret Johnson	Teresa Ray
Vernice Johnson	Eddie Shaw
Sandra Judd	Mary Shaw
Annette Locklear	Mildred Shaw
Geneva Locklear	William Shaw

Gloria A. Locklear	Carrie Simpson
Ruby A. Locklear	Barbara Smith
Shirley Locklear	TeWanda Spearman
Gloria Mainor	Kunehona Visessing
Helen McAllister	Eva Watkins
Johnnie McAllister	Gloria Williams
Martha McArn	Mary Willis

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(c) Post at Respondent's facility in Lumber Bridge, North Carolina, copies of the attached notice marked "Appendix."[24] Copies of said

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[24] If this order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read

(continued...)

notice, on forms provided by the Regional Director for Region 11, after being duly signed by a representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 11 in writing within 20 days from the date of this Order what

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[24](...continued)
"POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

steps Respondent has taken to comply herewith.

The complaint is dismissed in all respects other than those specific violations of the Act found.

Dated, Washington, D.C. 27 May 1986.

Hutton S. Brandon
Administrative Law Judge

"APPENDIX"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees for

engaging in protected concerted activities under the Act for mutual aid or protection.

WE WILL NOT fail or refuse to reinstate, either in a timely manner or at all, unfair labor practice strikers upon their unconditional application to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Patsy Clark, Jeanette Townsend, and Diane Williams, and, to the extent we have not already done so, the unfair labor practice strikers listed below immediate and full reinstatement to their former positions, or, if such

positions no longer exist, to substantially equivalent positions and make them whole for any earnings they have lost as a result of our discrimination against them, plus interest:

Diane Bell
Leacher Bilbo
Sarah Brooks
Barbara Bullard
Rosie L. Campbell
Vanessa Campbell
Christine Chavis
Vickie Chavis
Barbara Collins
Delphine Edwards
Vivian Godwin
Margaret Johnson
Vernice Johnson
Sandra Judd
Annette Locklear
Geneva Locklear
Gloria A. Locklear
Ruby A. Locklear
Shirley Locklear
Gloria Mainor
Helen McAllister
Johnnie McAllister
Martha McArn
Brenda McBryde
Dazza McBryde
Ola McBryde
Gladys McDonald
Barbara McDougald
Jonathon McEachin
Shirley McEachin
Johnny McGougan
Judy McNeill
Joann Miller
Charlene Pearson
Teresa Ray
Eddie Shaw
Mary Shaw
Mildred Shaw
William Shaw
Carrie Simpson
Barbara Smith
TeWanda Spearman
Kunehona Visessing
Eva Watkins
Gloria Williams
Mary Willis

WE WILL notify Patsy Clark, Jeanette Townsend, and Diane Williams that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

LUMBEE FARMS COOPERATIVE, INC.

(Employer)

Dated: _____

By: _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or

covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U.S. Courthouse, Federal Building, Room 447, 251 North Main Street, Winston-Salem, North Carolina 27101. Telephone: (919) 761-3212.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-3636

FILED
Jul 28 1988

U.S. Court of Appeals
Fourth Circuit

Lumbee Farms
Cooperative, Inc.,

Petitioner,

v.

National Labor
Relations Board,

Respondent.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The petitioner's petition for rehearing and suggestion for rehearing

in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Widener and Judge MacKenzie, Senior United States District Judge sitting by designation.

For the Court

/s/ John M. Greacen
CLERK

APPENDIX E

29 U.S.C. § 152(5) provides that:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 157 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an

agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(a) provides that:

It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to

encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor

organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. § 159 provides that:

> (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.
>
> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in

exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative

of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board --

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization

a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the

purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.